Supreme Court, U.S.
FILED
JUN 23 1998
CLERK

No. 97-1824

In The

# Supreme Court of the United States

October Term, 1997

ANTHONY J. CRIPPEN,

*Petitioner,*

*vs.*

ROBERT KUHLMANN, as Warden of the Sullivan Correctional Facility,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

JAMES M. CATTERSON, JR.
*District Attorney of Suffolk County*
MICHAEL J. MILLER*
*Assistant District Attorney*
Criminal Court Building
200 Center Drive
Riverhead, New York 11901
(516) 852-2500

*Attorneys for Respondent*

* *Counsel of Record*

147011

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, Inc.

## QUESTIONS PRESENTED

1. In this case the United States Court of Appeals for the Second Circuit denied Crippen's application for a certificate of probable cause. Should this Court decide the standard for a certificate of appealability when that device was not utilized in this case?

2. Every court which has reviewed Crippen's claim of ineffective assistance of counsel has held that it is meritless. Every court which has reviewed this claim has applied the facts to the correct legal standard. Should this Court engage in a factual review in order to essentially grant Crippen a certificate of probable cause?

## TABLE OF CONTENTS


| | *Page* |
|---|---|
| Questions Presented | i |
| Table of Contents | ii |
| Table of Citations | ii |
| Statement of the Case | 1 |
| A. Statement of Facts | 1 |
| B. Post-Conviction Procedural History | 3 |
| Reasons for Denying the Writ | 5 |
| Conclusion | 9 |


## TABLE OF CITATIONS

**Cases Cited:**


| | |
|---|---|
| *Lindh v. Murphy*, __ U.S. __, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997) | 5, 7 |
| *Nelson v. Walker*, 121 F.3d 828 (2nd Cir. 1997) | 7 |
| *People v. Crippen*, 196 A.D. 2d 548, 601 N.Y.S. 2d 152 (2nd Dept.), *lv. to app. denied*, 82 N.Y. 2d 848, 606 N.Y.S. 2d 600 (1993) | 4 |
| *Reyes v. Keane*, 90 F.3d 676 (2nd Cir. 1996) | 6 |

*Contents*


| | *Page* |
|---|---|
| *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) ..... | 8 |
| *Tankleff v. Senkowski*, 135 F.3d 235 (2nd Cir. 1998) . | 7 |
| *United States v. Perez*, 129 F.3d 255 (2nd Cir. 1997) . | 7 |
| **Statutes Cited:** | |
| 28 U.S.C. § 2254 ..... | 7 |
| 28 U.S.C. § 2255 ..... | 7 |
| **Other Authority Cited:** | |
| Pub. L. No. 140-132, 110 Stat. 1214 ..... | 6 |

## STATEMENT OF THE CASE

In this case the Court of Appeals for the Second Circuit denied Crippen's application for a certificate of probable cause. The Circuit Court utilized the certificate of probable cause rather than a certificate of appealability because Crippen had filed his petition for a writ of habeas corpus before the effective date of the Antiterrorism and Effective Death Penalty Act. There is no question in this case about the appropriate standard of review for a certificate of appealability. Furthermore, there is no necessity for further review in this case because the legal principle involved — effective assistance of counsel — is neither obscure nor complex and the lower courts correctly applied the law to the facts of the case.

### A. Statement of Facts

On January 5, 1986 Winifred Danz and Thomas Fehmel were murdered in Mr. Fehmel's apartment in Southampton, New York. Ms. Danz and Mr. Fehmel had gone to New York City that day to purchase their wedding rings (T.499-500). While they were gone Mr. Fehmel's mother went to the apartment for various reasons and left at about 6:30 P.M. (T.512-14). Mr. Fehmel's brother checked the apartment at 7:40 to 7:45 p.m. that same night and saw the victim's car was parked nearby and that the lights were on in the apartment (T.520-21). When the bodies of Mr. Fehmel and Ms. Danz were discovered, they were completed dressed and were still wearing their winter coats. Their take-out Chinese dinner was unopened on the table.

The police investigation established that Crippen was in the area of the apartment at the time that the couple was killed (T.561-66). Later that same evening, Crippen, who was visiting his cousin, left Southampton and returned to New York City; this was confirmed by Crippen's cousin who testified on

Crippen's behalf (T.562-63, 824-25, 1382-84, 1482-83). Crippen went to a housing development in Long Island City, Queens County. There, he told a friend that his cousin had done something out "on the Island" and he did not want to be blamed for it (T.824-25, 833-34, 842). Crippen remained at the Long Island City apartment from late on January 5th until the evening of January 6th when his girlfriend picked him up and brought him to her house (T.836-38, 856, 1186-87). At her house Crippen gave his girlfriend a cable television converter box (T.1092, 1188-97). The converter box, which was identified through a unique serial number, had been installed in the victim's apartment a few weeks before the murder (T.1035-36, 1134-38, 1142-43). Blood found on the converter box was consistent with Mr. Fehmel's blood (T.710-11). Crippen, therefore, was at the scene of the crime at the appropriate time, left the area soon afterwards, made veiled references about the crime to a friend later that same night, and soon after the crime gave proceeds from the crime to his girlfriend.

Additionally, Crippen confessed to the murders both orally and in writing (T.982-84, 1069-79). These detailed confessions explained how Crippen was interrupted during a burglary, how he stabbed his victims, cut the woman's throat, went to get more knives from the kitchen and continued to stab the victims, and then beat them with a pipe. Crippen also admitted his guilt to the police officers who transported him to jail and to court. Thus, when Crippen was brought from Police Headquarters in Yaphank to the Southampton Town Jail in Hampton Bays he said that he had really fouled up and committed a double homicide (T.1167-68). The next day when Crippen was brought to court he said that he was facing 50 years in jail and that the police should do him a favor and shoot him (T.1169-70, 1278-80).

Autopsies were performed on both victims. Thomas Fehmel died of multiple stab wounds, which cut the coratid artery,

jugular vein, and esophagus. There were also major blunt force injuries to the head and neck which were consistent with having been inflicted with a metal pipe (T.799-815). Similarly, Winifred Danz had multiple wounds which caused aspiration of blood. Her coratid artery and jugular vein were severed, as were her windpipe (trachea) and esophagus (T.787-89, 790-96).

**B. Post-Conviction Procedural History**

After his judgment of conviction was entered Crippen appealed. In the direct appeal he questioned the propriety of the cross-examination of his character witnesses and the trial court's jury charge. He also claimed that he was denied effective assistance of trial counsel. Contemporaneously with his direct appeal Crippen made a motion to vacate his judgment of conviction. His sole claim was that trial counsel was ineffective. Crippen filed an affidavit in support of his motion and he both attacked his attorney's competence and recounted his recollection of his conversations with defense counsel. We responded to defendant's motion and included an affidavit from defense counsel which explained the reasons for his actions. Any attorney-client privilege had, of course, been waived because Crippen made defense counsel's representation of him the subject of litigation and because Crippen revealed his recollection of the content of their conversations.

The trial court denied Crippen's motion and leave to appeal to the intermediate appellate court was granted. The direct appeal and the appeal from the denial of the motion to vacate were consolidated. The Appellate Division, Second Judicial Department, published its opinion on the combined appeals in August 1993. The court found that the trial record indicated that Crippen received meaningful representation through competent trial counsel. The court rejected the numerous claims presented and declined to second-guess trial counsel. The court

also found that the motion to vacate the judgment of conviction was properly denied. The court specifically rejected the idea that three cumulative witness should have been called at trial. Leave to appeal to the Court of Appeals of New York was likewise rejected. *People v. Crippen*, 196 A.D. 2d 548, 601 N.Y.S. 2d 152 (2nd Dept.), *lv. to app. denied,* 82 N.Y. 2d 848, 606 N.Y.S. 2d 600 (1993).

Crippen next sought collateral review in the federal courts. He petitioned for a writ of habeas corpus in the Eastern District of New York. His sole issue was the competency of trial counsel. Crippen again iterated his complaints, including that trial counsel should not have provided an affidavit in defense of his actions. Once again we responded to each unsubstantiated allegation and specifically noted that trial counsel's affidavit was the direct result of Crippen's affidavit. For whatever reason, Crippen waived his attorney-client privilege when he chose to both institute a legal proceeding based on trial counsel's representation and to reveal his recollection of the content of his conversations with trial counsel. Thus, in our Memorandum of law to the District Court, at page 54, we argued that there was no attorney-client privilege:

> Petitioner waived the attorney-client privilege when he moved to vacate his judgment of conviction based on alleged ineffective assistance of counsel. *People v. Dixon*, 204 A.D.2d 234, 235, 612 N.Y.S.2d 145 (1st Dept. 1994) (attorney-client privilege waived since defendant challenged counsel's representation). Parties waive the attorney-client privilege if they interject an issue into litigation which requires testimony from the attorney. *Thornton v. Syracuse Sav. Bank*, 961 F.2d 1042 (2nd Cir. 1992). Also, "[a] defendant may not use the privilege to prejudice his opponent's case or to disclose some selected

> communications for self-serving purposes." *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2nd Cir. 1991). Once a party discloses self-serving portions of his communications with his attorney the party cannot seek protection from other damaging portions of the communication. *Pleasantville Village Bd. v. Rattner*, 130 A.D.2d 654, 515 N.Y.S.2d 585 (2d. Dept. 1987).

The District Court, on February 20, 1997, denied Crippen's petition for a writ of habeas corpus and Crippen sought permission to appeal to the United States Court of Appeals for the Second Circuit. On or about May 16, 1997, Crippen submitted a document entitled *Application For Certificate of Appealability* and we responded to Crippen's application via a letter dated June 10, 1997. The Court of Appeals took no action with regard to this application. Rather, on December 10, 1997, the Court of Appeals notified counsel that the application would be treated as a motion for a certificate of probable cause. In response to the Court of Appeals notification Crippen submitted a document entitled *Petitioner Crippen's Supplemental Submission In Support of Application For Certificate of Probable Cause In Light of Supreme Court Decision In Lindh v. Murphy (Supplemental Submission)*. We responded, via affidavit, to Crippen's request for a certificate of probable cause and the Court of Appeals ultimately denied Crippen's request for a certificate of probable cause. Furthermore, Crippen petitioned for a rehearing from the order denying a certificate of probable cause and specifically noted that the rules regarding a certificate of appealability did not apply to this case.

## REASONS FOR DENYING THE WRIT

Under the guise of seeking certiorari about a narrow and technical issue of habeas corpus jurisprudence Crippen attempts

to again re-litigate a baseless claim that trial counsel was ineffective. Even Crippen, however, does not suggest that the courts which have reviewed his ineffective assistance of counsel claim have applied the wrong legal standard; rather he wishes further factual review. A fact determinative review is rarely, if ever, the proper subject for this Court. With this in mind Crippen asserts that if his application for a certificate of appealability were reviewed under a different standard the Second Circuit Court of Appeals would have granted review and — in turn — reached a different conclusion than every other court which has examined trial counsel performance. Crippen's application was, however, reviewed based on the long-standing and well understood criteria for granting a certificate of probable cause.

Crippen's petition for a writ of habeas corpus was filed in the District Court's Clerk's Office on February 21, 1995 and an Order to Show Cause requiring a response was issued on February 14, 1995. The response was dated March 30, 1995. All of these acts pre-date the Antiterrorism and Effective Death Penalty act of 1996 (AEDPA), Pub. L. No. 140-132, 110 Stat. 1214, which amended the procedures governing habeas corpus applications by prisoners in state custody. The District Court's Memorandum and Order denying Crippen's petition for a writ of habeas corpus was issued on February 20, 1997 after the effective date of the AEDPA — April 24, 1996.

There was no question that the AEDPA did not apply to Crippen's petition for a writ of habeas corpus. There was, however, actually some question whether the new certificate of appealability would apply to Crippen's case because the request for and decision about whether Crippen could appeal from the District Court's decision post-dated the effective date of the AEDPA. In *Reyes v. Keane*, 90 F.3d 676 (2nd Cir. 1996) the Court of Appeals had held that the AEDPA did not apply to habeas corpus petitions filed before the effective date of the act,

but the requirements for a certificate of appealability rather that a certificate of probable cause did apply. The court reasoned that the new standards for leave to appeal should apply since the application was made after the effective date of AEDPA.

The reasoning of Reyes was called into question by *United States v. Perez*, 129 F.3d 255 (2nd Cir. 1997). In *Perez* the court held that, in a case brought pursuant to 28 U.S.C. § 2255, a certificate of appealability was not required if the case was filed before April 24, 1996. The court relied on the holding in *Lindh v. Murphy*, __ U.S. __, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997), to reach this determination. Thus, in *Lindh* the provisions of the AEDPA were held not to apply to cases filed before the effective date of the act. Any doubt about the appropriate mechanism to seek review of habeas corpus cases filed before April 24, 1996 was dispelled in *Tankleff v. Senkowski,* 135 F.3d 235 (2nd Cir. 1998). In *Tankleff* the court specifically held that cases brought under 28 U.S.C. § 2254 should not be treated any differently than cases brought under 28 U.S.C. § 2255. Thus, a certificate of probable cause rather than a certificate of appealability was the proper mechanism to seek further review of a petition for a writ of habeas corpus filed before April 24, 1996, even when the application for further review post-dates the effective date of the legislation.

Here, there is no doubt that Crippen's application to the United States Court of Appeals for the Second Circuit was determined as a certificate of probable cause. Although the application straddles the Circuit Court's decisions regarding which statute was applicable, the letter sent by the Circuit Court and their decision denying review leave no doubt that the Circuit Court denied an application for a certificate of probable cause. Crippen acknowledged this on December 16, 1997 when he filed his *Supplemental Submission* and cited *Nelson v. Walker*, 121 F.3d 828 (2nd Cir. 1997), for the proposition that the

Circuit Court should apply the mechanism for a certificate of probable cause. Furthermore, Crippen affirmatively stated that the provisions of AEDPA did not apply to his case and that he was seeking a certificate of probable cause. Crippen got what he asked for and his application was considered as a request for a certificate of probable cause.

The present petition for certiorari should be denied because Crippen has set up a non-existent conflict. He now claims that this Court should determine the proper standards of review when a certificate of appealability/probable cause is requested. Here, however, everyone — the Circuit Court and Crippen — agreed that a certificate of probable cause was the appropriate legal mechanism. There is no question about the standards for such a certificate. Crippen, however, was set up a straw man in order to obtain a factual review of his case.

There can be no serious allegation that the State and Federal Courts are unaware of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and the jurisprudence regarding effective assistance of counsel. There is no question that the State and Federal courts used the correct legal principles and applied the facts to them. Despite Crippen's presentation there is no dispute among all of the lower courts that Crippen received the effective assistance of trial counsel. Crippen, however, disagrees with the result of the lower courts analysis and — in essence — wants this Court to direct the Circuit Court to reevaluate the facts of this case and issue a certificate of probable cause. Further fact based review is, however, unwarranted, as is a direction to reevaluate the evidence and issue a certificate of probable cause. There is no legal dispute in this case, only a factual one, and a writ of certiorari should not be issued.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES M. CATTERSON, JR.
*District Attorney of Suffolk County*
MICHAEL J. MILLER*
*Assistant District Attorney*
Criminal Court Building
200 Center Drive
Riverhead, New York 11901
(516) 852-2500

*Attorneys for Respondent*

* *Counsel of Record*